BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TYRONE J. BROWN	)	
Claimant	)	
	)	
VS.	)	
	)	
THE BOEING COMPANY	)	
Respondent	)	Docket No. 1,015,527
	)	
AND	)	
	)	
INDEMNITY INS. CO. OF NORTH AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier requested review of the Review and Modification of an Award by Administrative Law Judge (ALJ) John D. Clark dated March 9, 2006. The Board heard oral argument on June 6, 2006.

APPEARANCES

Dale V. Slape, of Wichita, Kansas, appeared for the claimant. Kirby A. Vernon, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ granted claimant's request for a modification of his earlier Award which granted him a 6 percent whole body permanent partial functional impairment. Since the entry of that Award, claimant was laid off effective June 30, 2005. The ALJ awarded claimant a 62 percent work disability based upon a 100 percent wage loss and a 24 percent task loss.

The respondent requests review of this decision, alleging claimant was, at the time of his layoff, working at regular duty without restrictions and had been doing so since the time of his original Award. Thus, respondent argues claimant is not entitled to any work disability because there was no change in his circumstances.

Claimant argues he was subject to restrictions at the time of his layoff, restrictions that had been imposed by respondent's own in-house physician. And independent of those restrictions, respondent's decision to lay claimant off triggered claimant's resulting wage and task loss.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant sustained an accidental injury while in respondent's employ. The accident injured his upper extremities and treatment was provided. Claimant was treated by various providers, including Dr. J. Mark Melhorn. On February 17, 2004, Dr. Melhorn released claimant to return to work. According to respondent's own records, this release apparently included restrictions, limiting claimant's ability to use power and vibratory tools. When these restrictions were presented to respondent, claimant says the company physician, Dr. Hein, elected to impose a more restrictive set of restrictions. This included limiting claimant's use of high impact vibratory tools to three hours of each eight-hour shift.[1] Claimant was then placed in a position that fell within Dr. Hein's restrictions.

According to claimant, he remained in this position until his last date of employment with respondent.[2] Respondent's plant medical records suggest that those restrictions were only applicable for one month, although the record is silent as to what occurred medically to warrant the expiration of those restrictions or if he was even seen by the plant physician in advance of that determination.

Thereafter, claimant's complaints continued. He apparently requested a second opinion or a change of physician and was referred to Dr. Bernard Poole, an orthopaedic surgeon. Dr. Poole evaluated claimant on April 21, 2004 and diagnosed bilateral carpal tunnel syndrome as well as gout. The gout was treated and, according to Dr. Poole, claimant required no work restrictions as long as his gout is kept under control. According

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[1] Stipulation (filed Feb. 8, 2006) at 3 (Ex. A.).

[2] Claimant last worked for respondent in March 2005, but then suffered an unrelated injury to his ankle and was unable to work. Although he was not physically working, he remained on the payroll until June 30, 2006.

to Dr. Poole, claimant was symptom free at the time of his last examination on February 10, 2005.

At the Regular Hearing, claimant acknowledged that Dr. Poole released him with no restrictions. But upon further questioning, he explained that while Dr. Poole released him without restrictions, both Dr. Melhorn and Dr. Hein had imposed restrictions which the respondent honored and continued to honor up until he was laid off. Thus, he believed he was subject to restrictions and continued to perform his accommodated job. Respondent asserts claimant's "explanation" is nothing more than a recharacterization of very clear testimony whereby claimant acknowledged he was working without restrictions.

Claimant was also examined by Dr. Munhall, on October 11, 2005, at his lawyer's request. Like the other physicians, Dr. Munhall diagnosed bilateral carpal tunnel and found the claimant to be at maximum medical improvement. He recommended claimant be assigned permanent modified duty, limiting his right and left hand activities with only occasional hand activities and the use of vibratory tools. Dr. Munhall also testified that, based upon a vocational analysis provided by Jerry Hardin, claimant sustained a 48 percent task loss as a result of his bilateral carpal tunnel complaints.

Since his layoff, claimant has consistently looked for work, registering with the local job service and inquiring at five to six potential employers each week. Unfortunately, he has not obtained any employment.

The ALJ concluded claimant had established a change of circumstances and was entitled to a permanent partial general (work) disability under K.S.A. 44-510e(a). Respondent stridently contends there has been no change of circumstance. Rather, respondent believes claimant had no restrictions at the time of his original Award and at of the time of his layoff, he had no restrictions. Essentially, respondent maintains Dr. Melhorn's restrictions and those of Dr. Heim were abandoned or superceded when Dr. Poole was assigned to provide claimant's care. And by issuing a full duty release, claimant no longer was eligible for work disability benefits.

The Board disagrees. The Kansas Court of Appeals has determined that whether an injured employee is working at an accommodated position is irrelevant for purposes of a subsequent layoff or termination.[3] What is crucial is whether the injured employee's condition warrants restrictions which, in light of a subsequent termination, puts him or her at a disadvantage in the open labor market.[4]

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[3] *Roskilly v. Boeing Co.*, 34 Kan. App. 2d 196, 116 P.3d 38 (2005).

[4] *Id.* at 200.

Under these facts, it is clear that both Dr. Melhorn and Dr. Heim imposed restrictions upon claimant's work activities in February 2004. Although those restrictions did, based upon respondent's records, have an "expiration" date, there is no explanation as to why those restrictions were set to expire. More importantly, claimant continued to work in the same position that accommodated those restrictions. Dr. Poole's subsequent decision to release claimant to work at full duty is not persuasive in light of claimant's ongoing bilateral hand complaints as well as Dr. Munhall's opinions. For these reasons, the Board finds that claimant's bilateral carpal tunnel condition warrants the imposition of restrictions and Dr. Munhall's restrictions are hereby adopted. Under the *Roskilly* rationale, claimant's layoff on June 30, 2005, constitutes a change in circumstance, regardless of whether his last job was accommodated, and entitles him to a work disability under K.S.A. 44-510e(a).

Permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

This statute must be read in light of *Foulk*[5] and *Copeland*.[6] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted

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[5] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[6] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[7]

The ALJ concluded claimant had established a 100 percent wage loss, expressly concluding claimant demonstrated a good faith effort to find post-layoff employment. The Board agrees. As for the task loss component, the Board is more persuaded by the opinions of Dr. Munhall and modifies the ALJ's factual finding to reflect a 48 percent task loss. When the two figures are averaged, the result is a 74 percent work disability. The ALJ's Review and Modification of an Award is hereby modified to reflect the 74 percent work disability.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated March 9, 2006, is affirmed in part and modified in part as follows:

The claimant is entitled to 24.90 weeks of permanent partial disability compensation at the rate of $440.00 per week or $10,956.00 for a 6 percent functional disability followed by permanent partial disability compensation at the rate of $440.00 per week not to exceed $100,000.00 for a 74 percent work disability.

As of June 26, 2006 there would be due and owing to the claimant 76.47 weeks of permanent partial disability compensation at the rate of $440.00 per week in the sum of $33,646.80 for a total due and owing of $33,646.80, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $66,353.20 shall be paid at the rate of $440.00 per week until fully paid or until further order from the Director.

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[7] *Id.* at 320.

IT IS SO ORDERED.

Dated this _____ day of June, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director